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United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

FLORA H. SCARBOROUGH and FLORA H.
SCARBOROUGH as Administratrix of the
Estate of Floris Scarborough, Deceased,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
Southern Division.

FILED

JUL 28 1931

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

ALVIN GERLACK, Esq., FREDERIC C. BENER, Esq., 220 Montgomery St., San Francisco, Calif. Attorneys for Plaintiff and Appellee.
GEORGE J. HATFIELD, U. S. Attorney, HERMAN VAN DER ZEE, Ass't U. S. Attorney, U. S. Post Office, 7th & Mission Sts., San Francisco, Calif., Attorneys for Defendant and Appellant.

In the Southern Division of the United States District Court for the Northern District of California.

18494-S

FLORA H. SCARBOROUGH and FLORA H. SCARBOROUGH, as administratrix of the Estate of Floris Scarborough, deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT—WAR RISK INSURANCE.

Plaintiff complains against the defendant and for cause of action alleges:

I.

That at all of the times herein mentioned plaintiff was, and still is a citizen of the United States and a resident of the Northern District and State

of California and of the City and County of San Francisco therein.

II.

That this action is brought under and by virtue of the War Risk Insurance Act and acts amendatory thereof, including Section 19 of the World War Veterans Act approved June 7, 1924, and amendments and supplements thereto, and is based upon a policy or certificate of War Risk Life Insurance issued under the provisions of the said War Risk Insurance Act, approved October 6, 1917, and acts amendatory thereof by the defendant to Floris Scarborough, deceased, who died on the 20th day of March, 1920.

III.

That on the 25th day of September, 1917, said Floris Scarborough enlisted in the United States Army as a private and was honorably discharged from said Army on April 4, 1919. [1*]

IV.

That Floris Scarborough, deceased, made application to the defendant for and was granted said insurance in the sum of \$10,000.00. That in his said application for said insurance, the said Floris Scarborough, now deceased, named as beneficiary of said insurance plaintiff Flora M. Scarborough.

That thereafter there was duly granted and regularly issued to said Floris Scarborough, deceased, by the defendant's said War Risk Insurance Bu-

*Page number appearing at the foot of page of original certified Transcript of Record.

reau, its certificate No. T....., of his compliance with said acts, so as to entitle him and his beneficiaries to the benefits of said acts, and the rules and regulations of said Bureau and the Director thereof, and that during the term of his said service up to and including the date of his discharge, the defendant deducted from his pay for such service, the monthly premiums provided for by said acts and rules and regulations promulgated by the defendant. That said Floris Scarborough, deceased, paid all premiums promptly when the same became due on said policy until discharged.

V.

That on October 3, 1918, while serving the defendant as aforesaid, Floris Scarborough, deceased, contracted certain diseases, injuries and disabilities resulting in and known as gunshot wound, high explosive; shell shock; traumatic neurosis; septice-mia; and other disabilities.

That said diseases, injuries and disabilities continuously since April 4, 1919, rendered and up to the time of his death on March 20, 1920, continued to render the said Floris Scarborough wholly unable to follow any substantially gainful occupation and on April 4, 1919, such diseases, disabilities and injuries were of such a nature and founded upon such conditions that at said time it was reasonably [2] certain they would continue throughout the lifetime of the said Floris Scarborough, deceased, in approximately the same degree.

VI.

That the plaintiff Flora H. Scarborough is the mother of Floris Scarborough, deceased.

VII.

That plaintiff on November 17, 1928, made application to the defendant, through its Veterans Bureau and the Director thereof, for the payment of said insurance for total and permanent disability and said Veterans Bureau and the Director thereof have refused to pay said Flora H. Scarborough said insurance and on May 29, 1929, disputed said plaintiff's claim to said insurance and disagreed with her concerning her rights to the same.

VIII.

That under the provisions of the War Risk Insurance Act and other acts of Congress relating thereto, plaintiff Flora H. Scarborough is entitled to the payment of \$57.50 per month for each and every month transpiring since the death of the said Floris Scarborough, deceased, to wit: the 20th day of March, 1920, up to and including the 3rd day of October, 1938.

IX.

That plaintiff has employed the services of Alvin Gerlack, an attorney and counsellor at law, duly licensed and admitted to practice before this court and all courts of the State of California. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is ten

percentum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act [3] of 1924 as amended.

As and for a second and separate cause of action against the defendant, plaintiff complains and alleges as follows:

I.

That on the 14th day of June, 1929, plaintiff Flora Scarborough was duly and regularly appointed the administratrix of the Estate of Floris Scarborough, deceased, by the Superior Court of the State of California, in and for the County of.

That also on said 14th day of June, 1929, plaintiff Flora Scarborough filed a good and sufficient undertaking as required by said Superior Court and took the oath of office as required by said Superior Court and took the oath of office as such administratrix and did all and such other things as are and were required of her to qualify as such administratrix. That thereafter and on said date, Letters of Administration of said Estate were duly and regularly issued to her by the Clerk of said Superior Court.

That ever since said date, plaintiff Flora Scarborough has been and still is the duly appointed, qualified and acting administratrix of the Estate of Floris Scarborough, deceased.

II.

Plaintiff adopts and re-incorporates in this her second cause of action, Paragraphs I, II, III, IV, V, VI, VII and IX of her first cause of action and makes them a part hereof, the same as if set out in full herein.

III.

That under the provisions of the said Act and other acts amendatory thereof, plaintiff as the administratrix of the Estate of Floris Scarborough, deceased, is entitled to the payment of \$57.50 per month for each and every month trans- [4] piring between said October 3, 1918, up to and including the date of death of said Floris Scarborough on March 20, 1920, during all of which time said Floris Scarborough was permanently and totally disabled.

WHEREFORE plaintiff prays judgment as follows:

First: That Floris Scarborough, deceased, from October 3, 1918, up to and including March 20, 1920, was totally and permanently disabled.

Second: That plaintiff Flora H. Scarborough have judgment against the defendant for the monthly installments of said insurance in the sum of \$57.50 per month from date of death of said Floris Scarborough, deceased, up to and including the 3rd day of October, 1938.

Third: That plaintiff Flora H. Scarborough as administratrix of the Estate of deceased have judgment against the defendant in the monthly installments of said insurance in the sum of \$57.50 for each and every month since the 3rd day of October,

1918, up to and including the time of his death on March 20, 1920.

Fourth: Determining and allowing to plaintiff's attorney a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of 1924, as amended, and such other and further relief as may be just and equitable in the premises.

ALVIN GERLACK,
Attorney for Plaintiff. [5]

United States of America,
State of California,
City and County of San Francisco.—ss.

Flora H. Scarborough, being first duly sworn, deposes and says: That she is the plaintiff in the above entitled action. That she has read the foregoing Complaint and knows the contents thereof and the same is true of her own knowledge, except as to those matters stated on information and belief and as to those matters she believes it to be true.

FLORA H. SCARBOROUGH.

Subscribed and sworn to before me this 13th day of June, 1929.

[Seal]

HENRIETTA HARPER.

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed June 14, 1929. [6]

(Title of Court and Cause.)

ANSWER TO COMPLAINT.

The United States of America for answer to the complaint of plaintiff herein denies each and all of the allegations thereof.

WHEREFORE, defendant prays that plaintiff take nothing by his said action and that defendant have its costs herein incurred.

GEO. J. HATFIELD,

GEO. J. HATFIELD,

United States Attorney.

GEO. M. NAUS,

Assistant United States Attorney.

CHELLIS M. CARPENTER,

Assistant United States Attorney.

Service of the within answer by copy admitted this 13 day of Sept. 1929.

ALVIN GERLACK,

Attorney for Plf.

[Endorsed]: Filed Sep. 13, 1929. [7]

District Court of the United States
Northern District of California
Southern Division

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco,

on Friday, the 15th day of August, in the year of our Lord one thousand nine hundred and thirty.

PRESENT: the Honorable A. F. ST. SURE, U. S. District Judge.

No. 18494-S

FLORA H. SCARBOROUGH, etc.

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

This case came on this day for trial. Frederick C. Benner, Esquire, appearing as attorney for plaintiff and H. A. Van der Zee, Assistant U. S. Attorney, appearing as attorney for defendant. The attorneys for the respective parties having orally stipulated that a trial by jury be waived; thereupon the Court proceeded with the trial of this case without a jury. * * * [8]



(Title of Court and Cause.)

FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

This cause came on to be tried by the court sitting without a jury, a jury trial having been expressly waived by the parties by an oral stipulation made in open court and entered in the record, on the 15th day of August, 1930; Alvin Gerlack, Esq., appearing as counsel and Frederick C. Benner, Esq., appearing as of counsel for the plaintiff; Hon.

George J. Hatfield, U. S. Attorney, and Herman Vander Zee, Esq., Assistant U. S. Attorney for the Northern District of California appearing as counsel for the defendant; whereupon evidence was introduced on behalf of the respective parties hereto and the court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT.

1. That the plaintiff at the time of the commencement of this action was a citizen of the United States and a resident of the Northern District and State of California, and of the City and County of San Francisco therein.

2. That this action is brought under and by [9] virtue of the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, as amended, and is based upon a policy or certificate of war risk insurance issued under the provisions of said acts by the defendant to Floris Scarborough, deceased, who died on the 20th day of March, 1920.

3. That said Floris Scarborough, deceased, enlisted in the United States Army on September 25, 1917, where he served as a private until April 4, 1919, when he was honorably discharged from said service and that during his service he applied for and was granted war risk insurance by the defendant in the sum of \$10,000 payable in the event he became permanently and totally disabled while said policy was in force in the amount of \$57.50 per

month under the defendant's policy or certificate; and that he paid premiums on said insurance up to and including April 30, 1919, during which time said policy was in force.

4. That in his application for said insurance, said Floris Scarborough, deceased, named as beneficiary of said insurance Flora H. Scarborough. That Flora H. Scarborough is the mother of said Floris Scarborough and the designated beneficiary of said insurance.

5. That on October 3, 1918, while serving the defendant as aforesaid, Floris Scarborough, deceased, contracted certain injuries, diseases and disabilities resulting in and known as gunshot wound, high explosive, shell shock; traumatic neurosis and septicemia, and that said diseases, injuries and disabilities continuously since April 4, 1919, rendered and up to the time of the death of said Floris Scarborough on March 20, 1920, continued to render said Floris Scarborough wholly unable to follow continuously any substantially gainful occupation and on said date such diseases, injuries and disabilities were of [10] such a nature and founded upon such conditions that at said time it was reasonably certain they would continue throughout the lifetime of said Floris Scarborough, in approximately the same degree. That ever since April 4, 1919, said Floris Scarborough, deceased, was permanently and totally disabled at all times from said date up to the time of his death on March 20, 1920.

6. That the plaintiff on November 17, 1928, made application to the defendant through its

Veterans Bureau and the Director thereof for the payment of the benefits of the war risk term insurance certificate herein sued upon for total, permanent disability of said Floris Scarborough, deceased, and said Veterans Bureau and the Director thereof refused to pay plaintiff said insurance and on May 29, 1929, disputed plaintiff's claim to said insurance benefits and disagreed with her concerning her rights to the same prior to the commencement of the above entitled action.

7. That a reasonable attorney's fee to be allowed to Alvin Gerlack, plaintiff's attorney, for his services rendered before this court in this action is ten percentum (10%) of the amount of insurance sued upon and recovered payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of June 7, 1924, as amended.

8. That on June 14, 1929, plaintiff Flora H. Scarborough was duly and regularly appointed the administratrix of the estate of Floris Scarborough, deceased, by the Superior Court of the State of California, in and for the City and County of San Francisco, upon which date said plaintiff Flora H. Scarborough filed a good and sufficient undertaking as required by said Superior Court and took the oath of office as such administratrix and did all and such [11] other things as are and were required of her to qualify as such administratrix and that ever since said June 14, 1929, when Letters of Administration of said estate were duly and regu-

larly issued to her by the Clerk of said Superior Court, said Flora H. Scarborough has been and still is the duly appointed, qualified and acting administratrix of the Estate of Floris Scarborough, deceased.

CONCLUSIONS OF LAW.

And as conclusions of law from the foregoing facts, the court concludes:

1. That the court has jurisdiction of the parties and the subject matter of this action.

2. That prior to the commencement of the above entitled action, the defendant disagreed with plaintiff as to her right to said insurance benefits on May 29, 1929, and that said disagreement existed at the time of the commencement of the above entitled action.

3. That the plaintiff Flora H. Scarborough, as administratrix of the Estate of Floris Scarborough, deceased, is entitled to judgment against the defendant in the sum of \$57.50 for each and every month beginning April 4, 1919, up to and including the time of his death on March 20, 1920, less an attorney's fee of ten per centum (10%) as herein provided.

4. That the plaintiff Flora H. Scarborough is entitled to judgment against the defendant for the monthly installments of insurance from the date of death of said Floris Scarborough up to and including the time of the commencement of the above entitled action on June 14, 1929, less an attorney's fee of ten per centum (10%) herein provided.

5. That Alvin Gerlack, plaintiff's attorney, is [12] entitled to an attorney's fee of ten per centum (10%) of the amount of insurance sued upon and recovered in this action for his services rendered before this court; and that the defendant United States of America deduct ten per centum (10%) of the amount of insurance sued upon and involved in this action and pay the same to said Alvin Gerlack of San Francisco, California, plaintiff's attorney, payable at the rate of one-tenth of all back payments and one-tenth of all future payments, which may hereafter become due on account of said insurance, said amounts to be paid by the U. S. Veterans Bureau to said Alvin Gerlack out of any payments to be made on account of said insurance to said plaintiff, or to the estate of said Floris Scarborough, deceased.

Dated this 15th day of August, 1930.

A. F. ST. SURE,

District Judge.

Approved as to form only as provided by Rule 22.

GEORGE J. HATFIELD,

U. S. Attorney.

By H. A. VANDER ZEE,

Asst. U. S. Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Aug. 15, 1930. [13]

In the Southern Division of the United States
District Court for the Northern District
of California.

No. 18,494-S

FLORA H. SCARBOROUGH and Flora H. Scarborough as Administratrix of the Estate of Floris Scarborough, Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

This cause came on regularly to be tried on the 15th day of August, 1930, before the court sitting without a jury; Alvin Gerlack, Esq., appearing as counsel and Frederic C. Benner, Esq., appearing as of counsel for the plaintiff; Hon. George J. Hatfield, U. S. Attorney, and Herman Vander Zee, Esq., Assistant U. S. Attorney, appearing as counsel for the defendant; and the Court having heretofore made and filed its Findings of Fact and Conclusions of Law:

IT IS ORDERED, ADJUDGED AND DECREED that Flora H. Scarborough, as administratrix of the Estate of Floris Scarborough, deceased, do have and recover of the United States of America, the defendant, the sum of Six Hundred Ninety and no/100 Dollars (\$690.00) as accrued monthly installments of insurance at the rate of \$57.50 per month beginning April 4, 1919, up to the death of the said Floris Scarborough on March 20, 1920.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Flora H. Scarborough, plaintiff, do have and recover of the United States of America, the defendant the sum of Six Thousand Three Hundred Eighty Two and 50/100 Dollars (\$6,382.50) as [14] accrued monthly installments of insurance at the rate of \$57.50 per month beginning March 20, 1920, up to the filing of the above entitled cause on June 14, 1929.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant United States of America deduct ten per centum (10%) of the amount of insurance sued upon and involved in this action and pay the same to Alvin Gerlack of San Francisco, California, plaintiff's attorney, for his services rendered before this court, payable at the rate of one-tenth (1/10) of all back payments and one-tenth (1/10) of all future payments, which may hereafter become due on account of said insurance, said amounts to be paid by the U. S. Veterans Bureau to said Alvin Gerlack out of any payments to be made under said insurance contract to the plaintiff herein, or to the estate of said Floris Scarborough, deceased.

Judgment entered August 15th, 1930.

WALTER B. MALING, Clerk. [15]

(Title of Court and Cause.)

PETITION FOR APPEAL.

The United States of America, defendant in the above entitled action, by and through Geo. J. Hat-

field, United States Attorney for the Northern District of California, feeling itself aggrieved by the judgment entered on the 19th day of August, 1930, in the above entitled proceedings, does hereby appeal from the said judgment to the Circuit Court of Appeals for the Ninth Circuit, and prays that its appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: November 18, 1930.

GEO. J. HATFIELD,

United States Attorney,

Attorney for Defendant.

[Endorsed]: Filed Nov. 19, 1930. [16]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

COMES NOW the United States of America, defendant in the above entitled cause, being the appellant herein, by and through Geo. J. Hatfield, United States Attorney for the Northern District of California, and in connection with its petition for appeal therein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it and upon which it relies to reverse the judgment herein:

I.

The District Court erred in denying defendant's motion for non-suit at the close of plaintiff's evidence herein upon the grounds that plaintiff's evidence had not established a prima facie case and was legally insufficient to sustain a judgment for plaintiff.

II.

The District Court erred in denying defendant's motion for judgment in its favor, made at the close of all of the evidence in said cause, upon the ground that all of the evidence in this case taken together had not [17] established a prima facie case for plaintiff and was legally insufficient to sustain a judgment for plaintiff; and upon the further ground that there was no evidence whatsoever in the record that the deceased insured was permanently and totally disabled from a date prior to the lapse of his policy on May 30, 1919, continuously to the date of his death on March 20, 1920, as alleged in the complaint.

III.

That the District Court erred in directing the entry of judgment for plaintiff herein when the evidence adduced on the trial of this action was insufficient to sustain the judgment.

WHEREFORE, defendant prays that its appeal be allowed, that this assignment of errors be made a part of the record in this cause, and that upon hearing of its appeal the errors complained of be corrected and the said judgment of August 15, 1930, may be reversed, annulled and held for naught;

and further that it be adjudged and decreed that the said defendant and appellant have the relief prayed for in its answer, and such other and further relief as may be proper in the premises.

GEO. J. HATFIELD,

United States Attorney,

Attorney for Defendant and
Appellant.

[Endorsed]: Filed Nov. 19, 1930. [18]

(Title of Court and Cause.)

ORDER ALLOWING APPEAL AND THAT NO
SUPERSEDEAS AND/OR COST BOND
BE REQUIRED.

Upon reading the petition for appeal of the defendant and appellant herein, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that no bond on this appeal, or supersedeas bond, or bond for costs or damages shall be required to be given or filed.

Dated: November 18, 1930.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Nov. 19, 1930. [19]

(Title of Court and Cause.)

DEFENDANT'S ENGROSSED BILL OF
EXCEPTIONS

To the Plaintiff above-named and to Messrs. Alvin Gerlack and Frederic C. Benner, her attorneys:
You, and each of you, will please take notice that the attached constitutes defendant's engrossed bill of Exceptions.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant. [20]

(Title of Court and Cause.)

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 15th day of August, 1930, the above entitled cause came on for trial; Messrs. Alvin Gerlack and Frederic C. Benner appearing for the plaintiff and Messrs. Geo. J. Hatfield, United States Attorney for the Northern District of California, and H. A. van der Zee, Assistant United States Attorney for said district, appearing for defendant; the said cause was tried by the court sitting without a jury, and the following proceedings thereupon took place.

TESTIMONY OF FLORA H. SCARBOROUGH.

Flora H. Scarborough, called as a witness in behalf of the plaintiff, being first duly sworn, testified:

(Testimony of Flora H. Scarborough.)

Direct Examination.

My name is Flora H. Scarborough. I am the mother of Floris Scarborough and I am a resident of San Francisco. My son enlisted in the army from New York State on September 25, 1917, and was discharged April 4, 1919. I was at Buffalo when he enlisted and when he returned.

My son took out a policy in the sum of \$10,000 war risk insurance, the premiums of which were paid up to the date of discharge. The date of discharge was April 4 and the policy was in effect up to May 30, 1919, and the policy lapsed June 1, 1919. I have been appointed the administratrix of my son's estate. (Letters of Administration of said estate issued to Flora H. Scarborough were introduced in evidence and marked Plaintiff's Exhibit No. 1).

For two years prior to the war my son had been working for R. A. Scarborough, another son, on the farm in New [21] York State, about forty miles out from Buffalo. I say my son frequently during those two years; he came home nearly every weekend. He was 5 feet 3 and weighed about 120 pounds immediately before he went into the service, and the general condition of his health was very good. I did not see him during the time he was in the service at all. I saw him when he returned from the service on April 4, 1919. He stayed with me most of the time until I came West, about a month later. I came to San Francisco to keep house for an older son. After that I did not see my son Floris until

(Testimony of Flora H. Scarborough.)

after he died. He died while I was on my way East. When I first saw him when he returned from the army he was completely changed, his color was poor, he was very sallow and his general disposition was so changed that we all noticed it, not only the family but all our friends. Before he went he was very deliberate and very good natured, but when he came back he was easily disturbed, he was not anything like he was before and he would sit down for some time and not say a word, and would not answer any questions you would ask him, and he was very erratic and very nervous and had no appetite and he did not sleep well at all. He used to complain of headaches quite a bit after he came back and when we talked to him about working he said he didn't feel like working. During the month that he was with me he didn't do anything. He was supposed to be staying with me and he would start out in the morning and go down town and at night I would get a telephone message from down on the farm that he was down there, and sometimes he would go out in the field to work and they would not know where he was, and I would telephone down at night that he had come back to Buffalo. We could not depend on him.

I don't know that there was anything else I noticed [22] about his condition during that time. During this month I don't think there was much change in his condition. He certainly did not improve any. When I came to San Francisco I re-

(Testimony of Flora H. Scarborough.)

ceived one letter from him, in July. I had planned to bring him with me when I came but he did not want to come and he wrote me in July that he thought maybe he would later in the Fall, but the letter was not very intelligible. It was so rambling that I immediately wrote to the boys that I thought he should see a doctor. By "the Boys" I mean my other sons that were there at the same time. Later I received a wire calling me East. They had been writing me about his condition. Along in November it became so serious that they wrote me that if I could I had better plan to come home. He died on Saturday night and I arrived in Buffalo early Monday morning. He died in the Marine Hospital in Buffalo. This hospital was taken over during the war as a Government hospital and I think it still is. I did not have a conversation with any of the doctors there in regard to his death. After that I often saw Dr. Mudge. I think he is the doctor who first attended my son.

I first made claim to the Veterans Bureau for this insurance early in April, I think, 1920; about two weeks after he was buried. I wrote them asking the status of his insurance—of course I thought probably it was not paid—I wrote and asked them if it was, and notified them of his death, and they wrote me in answer that it would not make any difference whether it was paid or not, if I could prove that he died from his war experience, it was payable just the same. I submitted the affidavit

(Testimony of Flora H. Scarborough.)

from Dr. Mudge. Just prior to this action I made a claim against the Bureau in legal form and a disagreement has been admitted. I have employed the services of Mr. Gerlack and Mr. Benner to represent me. [23]

Cross Examination.

I read the complaint that was filed in this suit. I must have done so. I never sign papers unless I read them. The complaint recites in paragraph 7 that I made this claim for insurance on November 17, 1928. I made this claim on the assumption that my son's insurance had been continued by him after he left the service. I hope to collect because I thought his policy was still alive after he left the service. The first time I made any claim upon the Veterans Bureau for payment by reason of permanent total disability acquired while in the service, was in 1928.

The last time I saw my son before his death was September 25, 1917, when he took the train for the camp. That was before he entered the war. I did not see him then again until he came home, about April 6, 1919. I last saw him immediately next prior to the time of his death, the first week in May, 1919. He was in Buffalo when I left to go home. He came to the train and saw me off. I know nothing concerning the injury which caused his death.

DEPOSITION OF R. A. SCARBOROUGH.

The deposition of R. A. Scarborough, a witness for the plaintiff, was read in evidence and the same reads as follows:

My name is R. A. Scarborough. I am forty-five years old. I reside at Middleport, New York. I am a machinist by occupation. I am a brother of Floris Scarborough, the deceased insured. I saw him practically every day during the year previous to his entering the United States Army on September 25, 1917. He was living with me in Johnson Creek, New York, at the time he entered the army in 1917. He was a farmer and worked for me on the farm. I saw him on or about September 25, 1917, when he entered [24] the army, and as I observed it, his health was good at that time. I have never known him to have any trouble with his health previous to entering the service and he lived with me from 1913 until he entered the service. I saw him immediately after his discharge from the army at Middleport, New York, as soon as he arrived home from Long Island. As I observed it, the condition of his health at that time was poor. He wasn't able to do anything. He looked all right, a little pale perhaps. He complained of weakness. When he came home he said he was going to try to farm and was going at it strong, but he couldn't do anything. Sometimes he would do the chores. Some days he would work a half day and some days only

(Deposition of R. A. Scarborough.)

two or three hours. He couldn't go to work and stick to it. He couldn't do any work.

As to his condition in April, 1919, compared to what it was in October or November of 1919, that is a hard question for an ordinary person to answer. He was thinner in October and November. He couldn't work. There was no improvement in his health during that time. As far as I observed, it was the other way if anything. To my knowledge he did no work after his discharge from the army. He did not work steadily, a half day at a time, quarter of a day, some days not at all. He made his home with me—all three of us boys. I can't remember if he worked for anyone else besides us boys or not. I can't recall any instance; of course that is ten or twelve years ago. He was sick. He was not able to work. He complained of being weak, first in his leg and then in his arm; sometimes one leg, sometimes the other; sometimes one arm, sometimes the other. When he entered the army he was able to go out and do anything, was stronger and able to do anything, and when he came out of the army he was not able to do anything. He had a scar on his leg right by his ankle. [25]

Cross Examination.

I saw my brother practically every day prior to his entering the United States Army in September, 1917. He lived with me at the time and worked

(Deposition of R. A. Scarborough.)

with me at that time. I paid him wages. Four or five years prior to September 25, 1917, he worked here in Buffalo but I couldn't say off-hand what place.

At the time he entered the army he was 5' 4" tall. I can't remember his weight. At that time he walked straight and upward and was not bent or stooped in any way. I stated that at the time he entered the army he made no complaints regarding his health and for that reason I state he was in good health at that time. If he had gone to a doctor, I would have taken him. Prior to September 25, 1917, I saw him every day he worked on my farm. Every day he was under my surveillance. The farm consisted of 100 acres. To the best of my knowledge and belief he was out working on the farm. At times he was at one end of the farm and I was at the other end. He came to Middleport, New York, as soon as he got out of the army, within a day or two. I said he looked a little pale. I didn't notice any difference in his weight, probably a variance of a few pounds. I noticed no difference in his stature or his walk. He started work around the farm right away. I agreed to pay him a salary but never did. He never got started to work. He would work on the farm for a few hours, do the chores, and after a while I would find him resting. He stayed with me quite a few days and one day he said "Well, I can't do much around here, guess I will go see mother." Mother

(Deposition of R. A. Scarborough.)

was in Buffalo at that time. While he was with me he worked a few hours a day. He stayed with me for several months and then returned to our mother. After that he went to Lee [26] and Marshall, our brothers. There was a period of time when he was away from my place but it would be hard to say how long as I would see him every little while. I say he could not do much work because he was weak. During the first few months after he returned from the army he did not see a doctor, to my knowledge. The first time he consulted a doctor to my knowledge was the 16th day of December. I know he injured his thumb. The thumb of one hand. I don't remember which one. The night I took him to the doctor the hand was not cut, there were no bruises, but practically the whole hand was swollen some. This was the night I took him to Dr. Mudge. I can not say what time of day it was. He was staying with our brother Lee at the time he was hurt. He was not living with me then and I couldn't say how he was hurt.

I saw him occasionally between October and December, 1919. He was staying with me practically all that time. When I used to see him I would say "John (we used to call him John), you are getting thin". I don't know that he was going down so very much. His color was normal up to the time he went to the hospital. I didn't observe that he walked differently than when he came back from the army. When I first saw his hand I couldn't say exactly

(Deposition of R. A. Scarborough.)

whether the thumb was larger than the thumb on the other hand or not.

My brother had no independent income after he came back from the army. For the work he did for me I gave him money to spend. I didn't give him any stated income, I just gave him money when he wanted it. He stayed with me between one week and ten days and then went to Buffalo. Three weeks later he returned to me and stayed a week or ten days. Then he went to my other brother's. Marshall, from Carlton, came up and he said he guessed he would go [27] down and see him a few days. Well, from then up until some time in June or July, he was back and forth between Marshall's place and my place. In that time I couldn't say whether he worked or not. Marshall's occupation at that time was selling automobiles and running a small greenhouse. From June until October he went to Lee's, sometime in June or July. Lee lives in Arcade. I don't know what his occupation was at that time. I don't know whether Floris worked out there or not.

DEPOSITION OF DR. MURRAY F. MUDGE.

The deposition of Dr. Murray F. Mudge, a witness on behalf of plaintiff, was read in evidence and the same reads as follows:

My name is Murray F. Mudge. I am sixty years of age and a physician residing at Middleport, New

(Deposition of Dr. Murray F. Mudge.)

York. I was licensed to practice medicine by the State of New York in 1895, and I am so licensed at the present time. I am a graduate of Niagara University and have been practicing medicine continuously since my graduation from Medical School. During the war I served as Captain in the Medical Corps of the United States Army from October 24, 1917, to August 16, 1919. I was assigned to Base Hospital at Camp Dix until May, 1919, and then to Camp Infirmary in Camp Dix. I had charge of all the contagious diseases for a while and also was in the Orthopedic Department. I am a Lieutenant Colonel, Medical Corps, in the Officers Reserve Corps.

I knew Floris Scarborough ever since he was four or five years old. I have been their family physician at Middleport, New York. His health prior to entering the service was good, so far as I know. I never treated him for any serious condition. I saw him frequently unprofession- [28] ally. After his discharge from the army he came to my office on December 18, 1919, for consultation. The only thing I can remember treating him for previously was for poison ivy and that was probably in 1914 or 1915. He came to see me December 18, 1919, about his hand and remained under my care until March 11, 1920. I made a diagnosis of injury to the thumb, swollen, and general run down condition. The last time I rendered any treatment to him was March 11, 1920. I did not treat him at his death. I believe there was a connection between

(Deposition of Dr. Murray F. Mudge.)

the septicemia, which caused his death, and previous disabilities. I did not see him from the date of his discharge until December and it would be impossible for me to state his condition at the time of his discharge from the army. At the time of my first examination I would not state that he was permanently and totally disabled, but upon continuous treatment and further examination (I treated him from December to March), I am convinced he was permanently and totally disabled. I reached that conclusion during that period. I considered at that time that this condition would continue throughout his lifetime.

Cross Examination.

I was in the Orthopedic Department of the Base Hospital about three months and a half. I did everything in the orthopedic line, bone fractures, split joints etc. Septecemia did not come under the orthopedic service. That would be for the medical service.

Floris Scarborough had a very bad case of poison ivy and he was susceptible to poison ivy. There are some persons more susceptible to poison ivy than others. In this particular case this boy had a very severe case in 1914 and 1915. When he came to my office in December, 1919, he made a complaint about the condition of his hand. His thumb was [29] swollen, he had a contusion on the hand. It appeared as a pressure injury to the thumb. The

(Deposition of Dr. Murray F. Mudge.)

thumb was swollen around the injury and was much larger than the other thumb. I couldn't say which hand it was. I decided that he had a septic infection as the result of the cut on the thumb. If there is a septic condition in a person, a bruise would be more apt to develop a local septic condition. A septic condition could arise from some poisoning in a person's system. In my opinion the septic condition might have been a direct result of the contusion of the thumb.

I never decided that this man had traumatic neurosis. I decided that Floris Scarborough was permanently and totally disabled within the first month after treatment. It was a question of how long he was going to live. He had septicemia until he died. A person might be able to work and follow a gainful occupation even though he had septicemia, if nothing came along to disturb that latent condition. Septicemia would not lay dormant for a great length of time, particularly if a person was subject to hard labor or conditions that would tend to bring down his condition. If this boy got over the severe case of blood poisoning, there still might have existed a septic condition, and with that condition existing he still could follow a gainful occupation. It is possible that he might get over the septicemia. I did not examine his heart and lungs at the time he came into my office. I just treated his thumb.

DEPOSITION OF CHARLES SCARBOROUGH.

The deposition of Charles Scarborough, a witness for the plaintiff, was read in evidence and the same reads as follows:

My name is Charles Scarborough; age 40; address 258 Stockbridge Avenue, Buffalo, New York; occupation, [30] accountant. Floris Scarborough was my brother. I did not see him for about seven years prior to his entering the service. I had never known him to have any trouble with his health previous to entering the service except ordinary children's diseases. After his discharge from the army on April 4, 1919, I first saw him about two weeks later at Buffalo, New York. His health, as I observed at that time was poor. He was thinner than I had seen him last. He gave me the impression, as so many soldiers that I have seen, that he had been shell shocked, he was irritable, erratic; he seemed to jump from one thing to another. The only thing he ever complained of to me was that he could not sleep at night. He said he had dreams. I did not pay so much attention to that because I thought it was a reaction from war experience. He was very funny, for instance, he would mention to me "let's go down to the corner and get a dish of ice-cream" and get half way down and before we got down there he would suggest something else and start up the other way, and he acted funny, is the only way I can describe it.

To my knowledge he had always been healthy and strong, always sort of an easy-going, deliberate

(Deposition of Charles Scarborough.)

sort of a fellow, and when I saw him he was jumpy, erratic, nervous, and got mad awfully easy. Naturally I thought there was something wrong with him. I did not see him in October and November, 1919. I did not see him at the time he entered the army.

Cross Examination.

Prior to April, 1919, I had last seen Floris Scarborough seven or eight years previously at Buffalo. He was going to school then. I left Buffalo at that time. I did not see him between seven and nine years prior to April, 1919. During that time I was in California and [31] Oregon. He would be about fifteen when I last saw him because he was still in school. In April 1919 I saw him for about a week or ten days. He was about twenty-four years old. He seemed much thinner than when he was fifteen. He was of short and stocky build.

TESTIMONY OF DR. SAMUEL E. WELFIELD.

Dr. Samuel E. Welfield, called as a witness in behalf of the plaintiff, being first duly sworn, testified:

I am a physician and surgeon licensed to practice by the State of California on June 6, 1918. I took medical work at the College of Physicians and Surgeons and Southern California University. At the present time I am specializing in industrial

(Testimony of Dr. Samuel E. Welfield.)

medicine. I am quite familiar with the disease of septicemia in its various complications. Septicemia means a general infection of the system, having its entry through the blood stream, primarily some source of infection, such as having a wound in any part of the body. It is usually caused by a germ which is a virulent pusproducing germ, and usually found in infected wounds; these germs may get into the blood stream and produce septicemia in either active or latent form. Septus merely has reference to the condition of the infection—a person having septicemia has a septus, a person having an infected wound we would say that he was in a condition of septus. In the latent condition of septus it may go on for years, it may go on for three, or four or five years even, and then have an acute effect on some organ such as the heart or some other organ in the body and there set up an acute infected process. There are degrees of septus condition. The most common physical effect of septicemia would be the feeling of weakness, loss in weight, decrease in the red blood cells, increase in the whites, and a general feeling of not being well or that something is wrong. [32]

It is possible for a person to have septicemia caused by some point of infection, such as an injury, and have that condition continue in the body, although the point where it originally was is healed; it does not happen very frequently, but it does happen. It might be possible that a person in October, 1918, received an injury to his leg in a

(Testimony of Dr. Samuel E. Welfield.)

form of two wounds from shrapnel and that in April of the following year he had some of the symptoms of septicemia as loss of weight and general run down condition and at the time the wound, as far as external appearance is concerned, is completely healed, and that the condition of septicemia might be traceable to the original injury. In other words, a person might have septicemia after the wound that caused it is healed. If a person had a condition of septus or septicemia, either an illness of some kind or another injury would be likely to bring that to a head. If a person has an injury to a thumb and within a month the thumb starts to swell and the hand swells and it becomes progressively worse, there is no limit to the time for the condition of septicemia to exist. It might run on for several years, even after it had showed itself externally. If a person is found to have a slightly pale color and a general weakness, irritability and nervousness, a slight loss of weight, a slight stooping condition, apparent inability to exert himself, if he suffers from bad dreams, poor appetite and inability to sleep, these are symptoms of a septic condition. These symptoms would be enough in itself to diagnose it a condition of septus, provided there was no external evidence of any other disease.

Cross-Examination.

In answer to the long hypothetical question I said it was possible in the case given to me that sep-

(Testimony of Dr. Samuel E. Welfield.)

ticemia might [33] be traceable to the original wound received some years before. So far as an individual case is concerned, I would not be able to state that positively unless I had made a physical examination. That answer was based only upon the hypothetical question. Not having seen the individual, of course it would be impossible for me to say that such a thing positively occurred, although it could occur. As a matter of fact it would have been most unusual, rather than usual. It is not the usual case, but I can only give my opinion based by experience. Considering the symptoms that were mentioned in the hypothetical case, it would be possible to trace such septicemia back to the original injury in the leg. The septicemia infection being in the thumb, that would also be an unusual case, rather than the usual. The symptoms given me, as assumed in the hypothetical question, might indicate a great number of other complications in addition to septicemia.

I am engaged in general practice. I get perhaps ten times as many cases of septicemia as the average doctor does who is in general practice. I treat industrial injuries. My fee in this case is \$100.00 and it has not been paid.

Redirect Examination.

It is possible for septicemia to be brought into the body through an injury to the thumb that does not break the skin but causes a blood blister. A con-

(Testimony of Dr. Samuel E. Welfield.)

dition of tonsilitis is not in any way a wound. It is merely an infection of the gland and that involves the blood stream through the throat. A blood blister, or a hematoma, a small blood tumor, producing a ruptured blood vessel caused by a wound of some kind, will sometimes become infected instead of being absorbed. Absorption is the usual thing. [34] The process of infection of a hematoma is the usual thing but we get them just the same. The blister need not be broken. I have seen that in about one out of fifty cases of hematoma. Hematoma is a blood clot from breaking a blood vessel and if we pick the skin the blood is underneath the skin and then instead of being absorbed as it usually is, the usual case is for the thing to become infected and we have to operate on it. If a person is in a healthy condition, in the usual case, it would be absorbed. Septicemia is the condition of the body; septicemia is the disease. If a person had septicemia and had this blood blister, the possibility of absorption would be that much less; if a person had a healthy normal blood, the probabilities are that it would be absorbed.

As to the cure for septicemia, it is a very difficult thing. First of all you have to try to get at the primary cause. If there is an acute infected process, the idea is to clear that up and abate the infection of the blood stream, placing the patient under a condition of rest, very careful diet, and treating him the same as you would a T. B. case or any other case of infection.

(Testimony of Dr. Samuel E. Welfield.)

Recross Examination.

In my experience in handling these cases of septicemia, I would say within my ten years' experience I have probably had half a dozen cases where the septicemia was caused by a new injury aggravated by an old well-healed wound or injury caused at least one year prior to the later wound which caused infection. The total number of cases treated by me during that time, conservatively, is 2,000, and the average where septicemia was so caused would be about six out of two thousand. [35]

Mr. VAN DER ZEE: I am going to move for a non-suit. I want to state the grounds of my motion, that the allegations of the complaint have not been established, even to the point of plaintiff making out a prima facie case under the evidence which she has offered. I refer particularly to the allegations that the disability complained of and the permanent total disability upon which the action is here based is alleged to have occurred prior to the discharge of the plaintiff from service, which is stated in the complaint to be April 4, 1919. The evidence of the plaintiff shows the fatal disease to have been incurred sometime very shortly prior to March, 1920, the latter date being the date of death. From the nature of the disease it is apparent that blood poison is a disease which runs its course in a case like this one in a very short time, and there certainly is no evidence offered by the plaintiff which connects the fatal injury to a time prior to April 4,

(Testimony of Dr. Samuel E. Welfield.)

1919, the time of the discharge of the deceased from service, or May 1, 1919, the time of the lapsation of the policy. There is absolutely no evidence whatsoever as to the disease occurring prior to that date, or any date prior to the month of March, 1920. Now, it being incumbent upon the plaintiff to prove not only the occurrence of the disease, but the condition of total permanent disability as of a date prior to the date of lapsation of the insurance on May 1, 1920, there is a total failure of the evidence to even establish a prima facie case, and I therefore move for a non-suit in favor of the Government on those grounds.

The COURT: Denied.

Mr. VAN DER ZEE: Exception.

Thereafter the following evidence was introduced on behalf of the defendant, The United States of America. [36]

The

DEPOSITION OF DR. G. S. PHILBRICK

was then offered in evidence without objection and the same reads as follows:

Direct Examination.

My name is Dr. G. S. Philbrick, of 8125 Buffalo Avenue, Niagara Falls, New York. I am a physician and surgeon licensed to practice medicine in

(Deposition of Dr. G. S. Philbrick.)

New York State. I was licensed to practice medicine July 2, 1917. I graduated from Creighton Medical College, Omaha, Nebraska, June 2, 1917, and have practiced medicine since 1917, specializing in surgery. I have done a great amount of surgical work. I was connected with the United States Marine Hospital, Buffalo, New York, from September, 1919, to June, 1927, as Clinical Director. Floris Scarborough was admitted to that hospital on March 11, 1920, during my period of service there. I made an examination of him upon his admission there. The physical examination report dated March 11, 1920, which you hand me, represents the true condition of Floris Scarborough on that date. The military history and present complaints recorded in that examination were furnished by Floris Scarborough himself. The physical findings made by me upon that examination were: he had a two-inch well-healed scar over outer aspect of left leg, about two inches above external malleolus; one and a half inch well-healed scar over outer aspect of left leg six inches above external malleolus. Has no pain, no limitation of motion, no complaint from wounds, no bone injury. My diagnosis of the patient's condition following upon the examination of March 11, 1920, was: blood poisoning right arm; old gunshot wound left leg; septicemia and contusion of thumb on right hand. He was a patient at the U. S. Marine Hospital about nine days. The date of his [37] death was March 20, 1920. With regard to his

(Deposition of Dr. G. S. Philbrick.)

physical condition as I observed it, apart from the report of physical examination, this man had evidently been suffering from blood poisoning in his right arm for a number of days and when admitted his condition was so grave that we felt it was an emergency, otherwise he could not have been admitted to a Government hospital for this intercurrent infection.

With regard to the gunshot wound of the left leg, these two scars on the outer aspect of his leg which were due to a gunshot wound, were completely healed, soft, pliable and non-adherent, and caused no limitation of motion or function of his leg. There was nothing about this gunshot wound of itself which should have caused any disability. In my opinion the gunshot wound in no way contributed either directly or indirectly to the condition from which Mr. Scarborough was suffering at the time of his admission to the U. S. Marine Hospital, Buffalo, New York, and subsequently thereto. The gunshot wound on the outer aspect of the left leg neither directly or remotely had anything to do with the septicaemic condition from which he was suffering upon admission to the said Marine Hospital or subsequently thereto. In my opinion, from the condition of the gunshot wound at the time of my examination of it, on March 11, 1920, and from my subsequent examinations and observations of it, it is not reasonable to presume that this gunshot wound has anything to do with the condition from

(Deposition of Dr. G. S. Philbrick.)

which Mr. Scarborough was suffering upon his admission to the U. S. Marine Hospital. The cause of his death, in my opinion, was general septicemia due to and complicating the infection in his right arm.

I have had a good many cases in my experience [38] involving conditions similar to those in this case. In my opinion and from my observation of the patient, and from my examination of his and my experience in such cases, I believe that had adequate surgical drainage been established early, that this man would have recovered. Upon my examination I did not find any disability other than those of septicemia and gunshot wound. In my opinion if Mr. Scarborough had not been afflicted with septicemia, from my observations and examination of him, there was no physical defect apparent which would have rendered it impossible for him to have engaged in a gainful occupation and followed it continuously. Under these conditions he could have engaged in any occupation for which he was educationally qualified or for which he might have been trained by experience.

The physical examination report made by Dr. G. S. Philbrick, March 11, 1930, was here offered and received in evidence and marked Government's Exhibit "A" and reads as follows:

"Report of Physical Examination

Date March 11, 1920 JAN, Notary Public.

Place Buffalo, New York.

Claimant's name Scarborough, Floris

(Deposition of Dr. G. S. Philbrick.)

Service organization and rank Private, Infantry
USA

Present address: Middleport, N.Y. R.F.D.

Age 25 Principal previous occupation: Farmer
Color, White—Single.

Brief Military History of claimant's disability:
Has never filed claim for compensation. GS Wound
left leg, in hospital 4 months. Discharged April 4,
1919.

Present complaint: Infection of right thumb
caused by cut on harness while harnessing horses
on the farm 3 months ago. General weakness, no
complaint from wounds in leg. [39]

Physical examination: Two inch, well healed
scar over outer aspect left leg, about 2 inches above
external malleolus. One and a half inch well healed
scar over outer aspect of left leg, six inches above
external malleolus. Has no pain, no limitation of
motion, no complaints whatsoever from wounds, no
bone injury.

Diagnosis:

2067 GS Wound of leg (left)

1082 Septicaemia

1737 Contusion of thumb, right hand.

Disability: State whether temporary partial:

Prognosis: Grave

Is claimant able to resume former occupation:
No. Do you advise it: NO.

Is claimant bed ridden: Yes. Is claimant able
to travel: No.

(Deposition of Dr. G. S. Philbrick.)

Do you advise hospital care: Yes. Will claimant accept hospital care: Yes.

In your opinion is disability due or traceable to service: No.

The claimant has a vocational handicap for his principal previous occupation which is MAJOR.

Why? State vocational handicap referred to in No. 18.

Is his physical and mental condition such that vocational training is feasible. No.

Did you examine the man yourself:

G. S. Philbrick, P. A. Surgeon (R) What disposition made: Hospitalized.

Any other remarks: Died March 20, 1920.

Auth. Form 4505—dated March 1st, 1928.

Pursuant to auth. in Sec. 8 W. W. V. Act.

A true copy

A. S. Thomson—Reg. Atty. U. S.
Veterans Bureau.

Cross Examination.

At the time when I examined Floris Scarborough I considered that he was permanently and totally disabled from following continuously a substantially gainful occupation as he was suffering at that time with blood poisoning in his right arm, from which he died.

Mr. VAN DER ZEE: I want to make a motion for judgment upon all of the evidence, upon the ground that the evidence both for the plaintiff and

(Deposition of Dr. G. S. Philbrick.)

for the defendant, taken together, does [40] not justify a finding of the truth of all of the allegations of the complaint.

The COURT: Denied.

Mr. VAN DER ZEE: Exception.

The COURT: The judgment of the Court is that plaintiff have judgment as prayed for together with attorney's fees.

Mr. VAN DER ZEE: May we have an exception to that also, your Honor?

The COURT: Yes.

Dated: February 26, 1931.

ALVIN GERLACK,

Attorney for Plaintiff.

GEO. J. HATFIELD V.D.Z.,

GEO. J. HATFIELD,

United States Attorney,

Attorney for Defendant. [41]

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions is duly proposed and agreed upon by counsel for the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of their record herein, and said bill of exceptions may be used by either parties plaintiff or defendant, upon any appeal taken by either parties plaintiff or defendant.

A. F. ST. SURE,

United States District Judge.

Dated: May 6, 1931.

It is so stipulated:

ALVIN GERLACK,

Attorney for Plaintiff.

GEO. J. HATFIELD, V.D.Z.,

United States Attorney,

Attorney for Defendant.

[Endorsed]: Filed May 7, 1931. [42]

(Title of Court and Cause.)

STIPULATION RE SENDING EXHIBITS TO
CIRCUIT COURT OF APPEALS.

IT IS HEREBY STIPULATED by and between the parties hereto that each of the exhibits introduced in evidence in the trial of the above-entitled action by plaintiff may be sent to the Circuit Court of Appeals for the Ninth Circuit to be used in the appeal of the above-entitled action by the said Appellate Court and to be deemed part of the bill of exceptions.

ALVIN GERLACK,

Attorney for Plaintiff.

GEO. J. HATFIELD,

United States Attorney.

Attorney for Defendant.

It is so ordered:

A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed May 18, 1931. [43]

(Title of Court and Cause.)

PRAECIPE

To the Clerk of Said Court:

Sir:

Please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore sued out and perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Complaint.
2. Answer to Complaint.
3. Minute order waiving jury.
4. Petition for Appeal.
5. Order Allowing Appeal.
6. Assignment of Errors.
7. Citation on Appeal.
8. Engrossed Bill of Exceptions.
10. Stipulation re sending exhibits to Circuit Court.
11. Findings of Fact and Conclusions of Law.
12. Judgment.
13. This praecipe.

GEO. J. HATFIELD,

United States Attorney,

Attorney for Defendant.

Service of the within praecipe by copy admitted this 19 day of May 1931.

ALVIN GERLACK,

Attorney for Plff.

[Endorsed]: Filed May 18, 1931. [44]

(Title of Court and Cause.)

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 44 pages, numbered from 1 to 44 inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$16.40; that said amount has been charged against the United States and the original Citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 27th day of May, A. D. 1931.

[Seal]

WALTER B. MALING,

Clerk United States District Court
for the Northern District of Cali-
fornia. [45]

CITATION ON APPEAL.

United States of America.—ss.

The President of the United States of America.
To Flora H. Scarborough and Flora H. Scarborough
as Administratrix of the Estate of Floris
Scarborough, deceased,

Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California wherein the United States of America is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. St. Sure,
United States District Judge for the Northern
District of California, this 18th day of
November, A. D. 1930.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Nov. 19, 1930. [46]

[Endorsed]: No. 6479. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Flora H. Scarborough and Flora H. Scarborough as Administratrix of the Estate of Floris Scarborough, deceased, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 28, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

